No. 4088.

United States Circuit Court of Appeals

For The Ninth Circuit

J. W. MAXWELL,

Plaintiff in Error,

—vs.—

EVA L. RICKS,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF IN ERROR

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Plaintiff in error, as endorsee, sued upon two phomissory notes, for $5000.00 each, executed and delivered by defendant in error to another at San Francisco, on November 19, 1920. At the time of the execution and delivery of the notes, the defendant in error executed and delivered to the promisee a mortgage upon certain real estate in California as security for their payment, which mortgage plaintiff in error offers to transfer to

defendant in error by proper instrument. Record, pp. 1-7.

Article X, Chapter I, California Code of Civil Procedure, relating to actions in the California courts, provides as follows:

> "Section 726.—PROCEEDINGS IN FORECLOSURE SUITS. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with this Chapter. In such action the court may, by its judgment, direct the sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage: and if it appears from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases in which execution may be issued."

It was contended by answer, and otherwise, that, since no foreclosure of the mortgage had been

sought or had, the court was without jurisdiction to render judgment. Record, pp. 14 and 15.

The district court sustained the position assumed by defendant in error and ordered the action dismissed. Record, pp. 21-25.

Judgment was then entered dismissing the action upon the ground that foreclosure must first be brought in California, and the mortgage security exhausted, before the initiation of any other suit or proceedings. Record, pp. 26 and 27.

The sole question arising here is whether the district court correctly construed the California statute, in holding that the statute ousted it of jurisdiction.

SPECIFICATIONS OF ERROR

I

The district court erred in holding and deciding that it was without jurisdiction to enter judgment upon the notes in suit, and in entering judgment of dismissal because of said want of jurisdiction, based upon the ground that the California statute ousted it of jurisdiction.

II

The district court erred in holding and deciding that plaintiff in error could not maintain the instant action, upon the ground that suit for foreclosure of the mortgage must be had in the State of California, and that no action would lie in this state and in the district court herein upon the notes endorsed to and held by plaintiff in error.

BRIEF OF ARGUMENT

The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They can not abdicate their authority or duty in any case in favor of another jurisdiction.

Watson v. Tarpley, 18 How. 517 (15 L. ed. 509);

Hyde v. Stone, 20 How. 170 (15 L. ed. 874);

Chicot County v. Sherwood, 148 U. S. 529 37 L. ed 546);

Harrison v. St. Louis &c. Co., 232 U. S. 318;

Lincoln County v. Luning, 133 U. S. 529 (33 L. ed. 766).

The right to contract the debt and to issue the promissory notes was not created or conferred by the statute of California. That right and the right to sue for recovery are common law rights, and the action is, and always has been, a transitory one. Venue and procedure can not be controlled by a state except in its own courts.

Atchison &c. Co. v. Sowers, 213 U. S. 55 (53 L. ed. 695);

Simon v. Southern Ry. Co., 236 U. S. 115;

Tennessee Coal &c. Co. v. George, 233 U. S. 353;

Cable v. U. S. Life Ins. Co., 191 U. S. 288, at 306.

The quoted statute is procedural only. It refers

to actions brought in the courts of California for the purpose of foreclosing mortgages upon property situated in that State. Its object was to prevent a multiplicity of suits and reflects the local policy as to remedies, but does not undertake to control the exercise of jurisdiction elsewhere, or to create or limit a contract obligation.

Ould v. Stoddard, 54 Cal. 613;

Blumberg v. Birch, 99 Cal. 416, 34 Pac. 102;

Felton v. West, 102 Cal. 266, 36 Pac. 676;

London &c. Bank v. Dexter Horton Co., 126 Fed. 593 (9th C. C. A.);

Mantle v. Dabney, 47 Wash. 394.

The original transaction between the parties consisted of two things, the principal one of which being the debt evidenced by the notes, while the mortgage given to secure the debt was the incident. The parties could have done any of three things: first, create the debt; second, create the debt and evidence it by the notes; and third, create the debt, evidence it by the notes, and secure the payment *pro tanto* the value of the property mortgaged. If they had done only the first of these things, or the first and second, there can be no question but that an action thereon would lie in the district court, *i. e.*, the judicial power vested in that court would extend to the controversy between the parties. But it is contended that, because of the mortgage and the statute of California, the court is deprived of its judicial power in the premises for the reason that

the statute becomes a part of the contract. However, the statute does not confine the creditor to his security, nor cancel the obligation in excess of the value thereof, nor make the security the principal thing, but provides for the enforcement of debts even though the security may prove insufficient, thereby still leaving the debt the principal thing and the security as incidental thereto; and, this being true, the statute is one of procedure only and does not inhere in the contrcat and has no extra-territorial effect.

The right to sue upon the debt is as old as the common law, existed at the time of the adoption of the Federal Constitution, and no State can deprive the United States courts of the right to exercise the judicial power vested in them by the Constitution and the Acts of Congress in pursuance thereof.

> "Of course, the jurisdiction of the United States Courts could not be lessened or increased by state statutes regulating venue or establishing procedure."
>
> *Simon v. Southern Ry. Co.*, 236 U. S. 115.
>
> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority, in any form, directly or

indirectly destroy, abridge, limit or render inefficacious."

Harrison v. St. Louis & S. F. R. Co., 232 U. S. 318.

"No stipulation or agreement, founded on a state statute, or otherwise, which the company may have entered into, could prevent the removal of the case in the exercise of its constitutional rights."

Cable v. U. S. Life Ins. Co., 191 U. S. 288, at 306.

Any other view of the matter would prevent citizens of other states from resorting to the Federal Courts for the enforcement of their claims and limit them to the special mode of relief prescribed by a State. The jurisdiction of the Federal Courts, in this manner, could be indirectly defeated. It will not be denied that the laws of the several states are of binding authority upon their domestic tribunals, but it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction vested in the courts of the United States, nor destroy or control the rights of parties litigant to resort to these courts.

Watson v. Tarpley, supra.

The courts of the United States are bound to proceed to judgment in every case to which their jurisdiction extends, and they cannot abdicate their authority in favor of another jurisdiction. This principle has been steadfastly adhered to.

Chicot County v. Sherwood, supra.

There are many instances where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act. This rule is well settled in those instances where the provision for the liability is coupled with a provision for a special remedy which alone must be employed. But if a common law right of action exists, or if a state creates a cause of action which is transitory, the state cannot destroy the right to sue on such a cause of action in any court having jurisdiction. A transitory cause of action can be maintained in another court even though the statute creating the cause of action provides that the action must be brought in local domestic courts.

Atchinson &c. Co. v. Sowers, supra.

Tennessee Coal &c. Co. v. George, supra.

It will be conceded that the general rule is, unless abolished by special statute, that a creditor, holding a note secured by mortgage, may ignore or waive his security and bring action upon the note alone.

While the law of the place governs the validity and interpretation of the contract, the remedy for its enforcement is governed by the law of the forum in which the remedy is sought.

5 R. C. L. 1042;

8 Corpus Juris, 94.

The California statute is found in the Code of Procedure of that State, remedies alone are there considered, and it is manifest that the section in

question relates exclusively to the remedy. No new obligation or liability is created; no attempt is made to destroy the common law right of action upon the debt evidenced by the note, or to limit the liability upon the contract debt or obligation. For the purpose of limiting the number of actions which might be had in the courts of that state upon the note and mortgage, the section was enacted.

The California Supreme Court has directly held that a valid suit could be maintained in another state upon a note given in California and secured by a mortgage on California lands. In that case the note was sued upon in Ohio, judgment obtained, but no recovery was had upon execution. Suit to foreclose the mortgage was then brought in California, and it was held that because of the statute it could not maintain the second action, in the State of California, and that the mortgage was waived by the Ohio action.

Ould v. Stoddard, 54 Cal. 613.

It has also been held that where there was a decree of foreclosure without personal service, so that no judgment for deficiency could be entered in the foreclosure suit, the amount made by foreclosure sale would be treated as a payment upon the note, and a second action could be brought on the note for the balance.

Blumberg v. Birch, 99 Cal. 416; 34 Pac. 102.

It will be seen by a consideration of the last two cases, that the California court expressly recog-

nized the existence of the debt, the right of action upon it, and that the statute merely controlled the remedy in courts of that state. And, in still a later case, the following statement is made in construing the section in question.

> "It is hardly necessary to say that the action for the foreclosure of this mortgage, brought in the State of Oregon, was not the action referred to in this section of the Code of Civil Procedure, nor was that action brought under any other provisions of our Code. *This section refers to actions brought in the courts of California* for the purpose of foreclosing mortgages upon property situate in the State of California."
>
> *Felton v. West,* 102 Cal 266; 36 Pac. 676.

It must be conceded that the law of California now is, as construed by its courts, that if one brings a suit upon a note and mortgage in the courts of that state, he must first exhaust the mortgage security and then proceed upon a deficiency judgment, if any; but if he sues in the courts of another state upon the debt or note, and obtains judgment, he has conclusively waived the mortgage security because the statute does not permit a second action. And, in very truth, what is there in the statute, or in the declared policy of the statute, which forbids such construction?

It was answered by the lower court that, if plaintiff secured judgment in this suit, he could sue upon his judgment in California and resort to

any property of the defendant for its satisfaction, thereby easily defeating the purpose of the law. In what respect would such a procedure defeat the purpose of the law? The purpose of the statute was not to protect the debtor from having other property levied upon. The mischief sought to be remedied was the practice of bringing two actions when all rights could readily be enforced in one.

Felton v. West, supra.

Ould v. Stoddard, supra.

If the plaintiff in error had sued on the note and mortgage in California, but was unable to obtain personal service upon the defendant, and a sale of the mortgaged property upon foreclosure was had, and the amount made on sale was credited as a payment upon the note, he would have been entitled to sue upon the note for any balance either in California, or other state in which he could obtain service of the person.

> "It seems to us, therefore, that in a case like this, the amount realized from the proceeds of the sale may properly be treated as a payment on the note, and that an action thereon may be maintained to recover the balance left unpaid. * * * and whether it be said to be based on the note or on an indebtedness resulting from the facts stated, is immaterial."
>
> *Blumberg v. Birch, supra.*

Moreover, if foreclosure on personal service had been had in California, and a deficiency judgment resulted, such deficiency judgment could be sued

on by the plaintiff in error in any state where the defendant might be found.

It was not the intent or the purpose of the statute, as mistakenly assumed by the district court, to destroy or to impair in any manner a debt obligation, or its transitory character, or any substantive right thereunder, nor to protect the general property of the debtor from payment of the obligation; but the statute, being merely procedural, was framed to avoid multiplicity of action in the courts of California. It was not attempted to trench upon the jurisdiction of any other court, nor to take away from any suitor the right of resort to any court secured to him by the laws of this country or by the Constitution. To yield to the construction given the California statute by the court below, is to hold that if a debt exists or is created between two parties, and security for that indebtedness taken upon lands in California, no court has jurisdiction to enforce such common law obligation except the courts of California. The matter of citizenship does not enter into the determination of the point: the creditor and the debtor may both be residents of Washington and the security be taken upon lands in California, yet, upon the construction invoked, the creditor must first exhaust the security in the courts of California (and may not have jurisdiction of the person of defendant) and if any deficiency results, he must return to the State of Washington and bring his first personal action against the debtor. No such

circuity of action was ever designed by the legislature of California in seeking to avoid multiplicity of action. The statute does not deny one the right to sue upon the obligation in another state, but its utmost prohibition is to deny the creditor the right of foreclosure in California if judgment be taken upon the debt in another state, and this upon the theory and the construction by the courts of California that such former action waives the mortgage security. The instant action was commenced with full knowledge that, under the construction given to the law of California, the right to foreclose upon the security taken in California would be waived by the recovery of a judgment herein.

We respectfully submit that the judgment of the district court, dismissing the cause upon the ground of want of jurisdiction, was erroneous and should be reversed, with instructions to the lower court to proceed to judgment upon the merits.

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